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No. 81-2162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PIONEER FINISHING CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and KENNETH PACHECO, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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The N.L.R.B.'s characterization of the principle question involved in this case as an "abuse of discretion" issue is an obvious ploy designed to mask the deleterious impact of the decision below upon the role that arbitration plays in effectuating national labor policy.

Notwithstanding the Board's frail attempt to glean technical distinctions between the First Circuit's decision at bar and the clearly contradictory conclusions of other circuits, the federal appellate courts are adrift in a sea of confusion over the practical consequences of the Board's elusive standards for determining when it must defer to an arbitrator's decision. In the absence of a reasonable degree of certainty in this area,

employers and unions will become increasingly reluctant to submit their disputes to the arbitration process. Because the contractual resolution of disputes through arbitration is a cornerstone of our national labor relations policy, it is imperative that this Court establish the guidelines necessary to restore certainty to the process.

This Court's recognition of the importance of arbitration as an indispensable element of the collective bargaining process requires no elaboration. *See, e.g., Boys Market, Inc. v. Retail Clerks,* 398 U.S. 235, 252 (1970); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960); *United Steelworkers of America v. Warrior & Golf Navigation Co.,* 363 U.S. 574, 578 (1960); *cf* Burger, *Isn't There A Better Way?* 68 A.B.A.J. 274 276 (1982). However, the arbitration process cannot be effective in fulfilling its function if arbitrators' decisions are cavalierly ignored, if the arbitrator is forced into the role of a mini-NLRB, or if there is no incentive for the parties to submit to arbitration. The decision below, contrary to the rulings in other circuits, authorizes these unfortunate prospects and, thereby, diminishes the viability of arbitration.

The genesis of the problem rests with the NLRB's decision in *Suburban Motor Freight Co.,* 247 N.L.R.B. 146 (1980). Prior to *Suburban Motor,* the generally recognized criteria, as ennunciated in *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955), authorized deferral when (1) the parties agreed to be bound by the arbitrator's decision; (2) the procedures were fair; and (3) the decision was not repugnant to the purposes and policies of the Act. Despite changes in focus, interpretation and emphasis, these criteria remained relatively constant until 1980 when, in *Suburban Motor,* the Board announced that "we will no longer honor the results of an

arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator."[1]

Suburban Motors thus provided a trump card to a participant in an arbitration proceeding who could submit to arbitration and withhold the unfair labor practices claim or inferentially raise the claim and place the arbitrator in an untenable situation. This has led the courts to adopt a variety of disparate standards for reviewing the arbitrator's conduct.

In *NLRB v. Pincus Brothers, Inc.*, 620 F.2d 367 (3d Cir. 1980) and *NLRB v. General Warehouse Corp.*, 643 F. 2d 965 (3d Cir. 1981), the Third Circuit established the principle that deferral was required when the record revealed "some evidence" that the unfair labor practice contention had been decided.[2] In *Distillery Workers, Local 2 v. NLRB*, 664 F.2d 318 (2d Cir, 1981), *cert denied sub nom, Liquor Salesmen's Union Local 2 v. NLRB*, ____ U.S. ____ (No. 81-1544; 5-17-82), the Second Circuit held deferral appropriate when the arbitrator's findings of fact were "necessarily dispositive of the statutory issue" and the issue had been decided "in substance." 664 F.2d at 325. The Fourth Circuit has gone even further in *NLRB v. Motor Convoy, Inc.*, 673 F.2d 734, 736 (4th Cir, 1982), in concluding that a dismissal for "just cause" under a collective bargaining agreement inherently contains a resolution of whether the employee was fired for an illegal or illicit cause.[3]

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[1] The NLRB's brief in opposition implies that this new standard is one of four established criteria which have had longstanding acceptance. *But see* Motor Convoy, Inc. v. NLRB, 673 F.2d 734, 735 n.2 (4th Cir. 1982).

[2] The NLRB's attempt to distinguish these decisions on the ground that the arbitrator in *Pincus Brothers* considered the statutory question while the arbitrator in *General Warehouse* did not misses the point. The question is what legal standard must be employed in reviewing the record, not what the record shows, as a factual matter, when tested by that standard of review.

[3] *See also* Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 355 (9th Cir. 1979) ("The reasoning, if ambiguous, could have been in order to give arbitration the 'hospitable acceptance' necessary if 'complete effectuation of the Federal Policy is to be achieved.' ").

The cogent rational underlying the development of a responsible judicial standard for reviewing the degree to which the record must reflect the arbitrator's consideration of the statutory issue was best articulated in *Motor Convoy*:

> To allow such a reversal runs counter to well established federal labor policy which strongly favors peaceful resolution of disputes through private arbitration. See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). If Petitioner is correct in its asserted approach to this problem, litigants in [the employee's] position would be motivated not to submit unfair labor practice charges to arbitration as provided in their collective bargaining agreements. Instead, during an arbitration proceeding, an employee would not assert a possible unfair labor practice charge but hold it in reserve for "appeal" to the National Labor Relations Board in case of an adverse ruling. Arbitration would become nothing more than a costly extra step in the march to federal court rather than the cost efficient and rapid resolution of disputes it is designed to be. As a consequence, it is certain that arbitration machinery would be included in fewer collective bargaining agreements inevitably expanding unnecessarily the caseloads of the federal courts and the National Labor Relations Board.

673 F.2d at 736-37.

In the opinion below, the First Circuit ignored these important policy considerations in holding that the record must reflect an "individualized analysis" of the statutory issues. Concluding that "[i]t is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact he chose

instead to rest his decision on contractual grounds", the decision below converts the arbitrator into a mini-NLRB, and, thereby, frustrates the important objectives of arbitration.

To assure that the decision below, in bold contrast to the rulings from other circuits, does not defeat the role of arbitration as a meaningful adjunct of collective bargaining or deter parties from participating in the arbitration process, it is essential that this Court resolve the conflict and determine the precise legal standards under which the NLRB is compelled to defer to an arbitrator's decision with respect to unfair labor practices issues.

CONCLUSION

For these reasons, as well as those stated in our Petition For A Writ Of Certiorari and those advanced by Amicus Curiae In Support Of The Petition, the writ should be granted.

Respectfully Submitted,

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